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behalf of all others similarly situated

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

In Re WAL-MART STORES,  
INC. WAGE AND HOUR  
LITIGATION

Case No. C 06 02069 SBA

**CLASS ACTION**

**██████████, FIRST AMENDED  
CONSOLIDATED COMPLAINT**

This Document Relates To:

Case Nos.

C 06 02069 SBA (Smith) and  
CV 06 05411 SBA (Ballard)

1. **Statutory Wage Violation of  
California *Labor Code* §§ 201- 203  
(Late Payment Penalty)**
2. **Statutory Wage Violation of  
California *Labor Code* §227.3  
(Vested Vacation Wages)**
3. **Statutory Wage Violation of  
California *Labor Code* §1194  
(Failure to Pay All Overtime  
Wages Due)**
4. **Statutory Wage Violation of  
California *Labor Code* §226  
(Failure to Accurately Record and  
Report Wages Earned and Rates  
of Pay)**
5. **Unfair Business Practices In  
Violation of *Business and  
Professions Code* §17200, *et seq.***
6. **Conversion of Wages**

DEMAND FOR JURY TRIAL

**FIRST AMENDED CONSOLIDATED COMPLAINT**

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Barry Smith, Michael Wiggins, Danton Ballard and Nathan Lyons (hereinafter collectively referred to as "Plaintiffs") individually, and on behalf of all others similarly situated, bring this Class Action Complaint against Defendant Wal-Mart Stores, Inc. ("Wal-Mart") and allege the following upon information and belief, except as to those allegations concerning Plaintiffs, which are alleged upon personal knowledge:

### NATURE OF THE ACTION

1. This is a class action for violation of California wage and hour laws brought by Plaintiffs, for themselves and on behalf of all current and former employees of Wal-Mart employed in the State of California similarly situated from March 20, 2002, to the present. During the relevant time period, Plaintiffs and the Class suffered the following: (i) former employees failed to receive all of the wages due them at the time of termination; (ii) current and former employees suffered the loss and forfeiture of accrued vacation wages and personal time wages and have not been paid for all earned and accrued vacation wages and personal time wages; (iii) current and former employees are owed overtime wages; and (iv) current and former employees have been harmed by Defendant's failure to keep accurate record of wages earned and rates of pay pursuant to *Labor Code* §226.

2. Defendant administered a corporate policy, practice, and/or custom concerning the vesting and forfeiture of vacation wages that resulted in a violation of California *Labor Code* §§203, 226, 227.3, and California *Business and Professions Code* §17200, *et seq.*, (Unfair Practices Act.)

3. Defendant administered a corporate policy, practice, and/or custom concerning failure to pay all overtime wages owed to all non-exempt employees that resulted in a violation of California *Labor Code* §§201 through 203 and 1194, and California *Business and Professions Code* §17200, *et seq.*, (Unfair Practices Act.)

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1           4. Defendant administered a corporate policy, practice, and/or custom  
2 concerning the recording of bonuses, commissions, and other non-discretionary  
3 incentives that violated California *Labor Code* §226.

4           5. This First Amended Complaint challenges systemic illegal employment  
5 practices resulting in violations of the California *Labor Code*, *Business and*  
6 *Professions Code*, and applicable Industrial Wage Commission (“IWC”) wage orders  
7 against employees of Defendant.

8           6. Plaintiffs are informed and believe and based thereon allege that  
9 Defendant, joint and severally, has acted intentionally and with deliberate indifference  
10 and conscious disregard to the rights of all employees regarding receiving all accrued  
11 vacation wages and paid time off wages, receiving pay for all overtime wages owed,  
12 and in Defendant’s duty to accurately record wages earned and rates of pay.

13           7. Plaintiffs are informed and believe and based thereon allege that  
14 Defendant has engaged in, among other things, a system of willful violations of the  
15 California *Labor Code*, *Business and Professions Code*, and applicable IWC wage  
16 orders by creating and maintaining policies, practices and customs that knowingly deny  
17 employees: (a) all earned and accrued vacation wages (including paid time off wages)  
18 and failed to pay former employees for all accrued and vested vacation and paid time  
19 off wages; (b) failed to pay for all overtime wages earned; and (c) failed to keep  
20 accurate records of rates of pay and wages earned.

21           8. The policies, practices and customs of Defendant described above and  
22 below have resulted in unjust enrichment of Defendant and an unfair business  
23 advantage over businesses that routinely adhere to the strictures of the California *Labor*  
24 *Code*, *Business and Professions Code*, and applicable IWC wage orders.

25           9. Wal-Mart is a for-profit corporation that has grown to become the world’s  
26 largest retailer. Wal-Mart employs approximately 1.3 million workers in the United  
27 States, including approximately 75,000 in the State of California. Plaintiffs estimate

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1 there are approximately 225,000 current and former employees in the State of  
2 California.

### 3 JURISDICTION AND VENUE

4 10. This Court has jurisdiction over this class action pursuant to 28 U.S.C.  
5 §1332 in that the matter in controversy exceeds \$5,000,000 and Defendant is domiciled  
6 in a state other than the domicile of the members of the Class, and the estimated  
7 number of Class members exceeds 150,000.

8 11. Venue is proper in this district pursuant to 28 U.S.C. §1391(a) in that the  
9 Defendant is subject to personal jurisdiction in this district at the time the action is  
10 commenced and, pursuant to 28 U.S.C. §§1391 (b) and (c), because a substantial part  
11 of the events or omissions giving rise to the claim occurred and had their primary affect  
12 in this judicial district.

13 12. Pursuant to *Civil Local Rules* 3-2, assignment to the Oakland Division of  
14 the United States District Court for the Northern District of California is appropriate  
15 because Defendant operates retail stores in the County of Alameda, as well as in other  
16 locations in California. Plaintiffs Smith and Wiggins were employed by Defendant  
17 Wal-Mart in the Northern District of California.

### 18 PARTIES

19 13. During all times mentioned herein, Plaintiffs and the proposed Class are  
20 current and former employees of Defendant Wal-Mart in the State of California. As  
21 such, they are subject to and enjoy the benefits of the wage and hour provisions of  
22 California law.

23 14. During all times mentioned herein, individual and representative Plaintiff  
24 Barry Smith was and now is a resident of Santa Clara County, California. Said  
25 Plaintiff was employed by Defendant Wal-Mart from approximately September 22,  
26 2003, to December 17, 2004.

27 15. During all times mentioned herein, individual and representative Plaintiff  
28 Michael Wiggins was, and now is, a resident of Contra Costa County, California. Said

1 Plaintiff was employed by Defendant Wal-Mart from approximately April 1, 2004, to  
2 October 7, 2005, at which time he was suspended. He was officially terminated on  
3 October 21, 2005.

4 16. During all times mentioned herein, individual and representative Plaintiff  
5 Danton Ballard was, and now is, a resident of Los Angeles County, California. Said  
6 Plaintiff was employed by Defendant Wal-Mart from on or about July 2004, to on or  
7 about February 23, 2006.

8 17. During all times mentioned herein, individual and representative Plaintiff  
9 Nathan Lyons was, and now is, a resident of Los Angeles County, California. Said  
10 Plaintiff was employed by Defendant Wal-Mart as an hourly employee for  
11 approximately 1 year and 2 months, and was terminated on or about March 23, 2006.

12 18. Defendant Wal-Mart Stores, Inc., is a Delaware corporation, doing  
13 business throughout the State of California, with principal offices in the State of  
14 Arkansas.

15 19. Defendant Wal-Mart Stores, Inc., is a for-profit corporation and the  
16 largest retailer in the world, with approximately 75,000 or more current employees in  
17 the State of California.

### 18 **FACTUAL ALLEGATIONS**

19 20. Plaintiffs bring this action as a class action to recover statutory damages  
20 and monies due and owing for all similarly situated current and former employees of  
21 Defendant for Defendant's failure to timely pay wages and failure to pay overtime,  
22 "holiday pay" and "vacation pay."

23 21. Throughout the class period, as the same is defined hereafter, Defendant  
24 administered and employed a corporate policy, practice and/or custom concerning the  
25 payment of the final wages due a terminated or resigning employee in violation of  
26 California *Labor Code* §§201 through 203, and related sections.

27 22. Throughout the class period, as the same is defined hereafter, Defendant  
28 administered and employed a corporate policy, practice and/or custom concerning the



1 payment of accrued vacation pay (including vacation, personal and holiday time) in  
2 violation of California *Labor Code* §227.3, and related sections.

3 23. Throughout the class period, as the same is defined hereafter, Defendant  
4 administered and employed a corporate policy, practice and/or custom concerning the  
5 payment of overtime wages in violation of California *Labor Code* §1194, and related  
6 sections.

7 24. Throughout the class period, as the same is defined hereafter, Defendant  
8 administered and employed a corporate policy, practice and/or custom concerning the  
9 requirement to accurately record and report wages earned and rates of pay, in violation  
10 of California *Labor Code* §226.

11 25. The systematic illegal employment practices set forth above and hereafter  
12 constitute violations of the California *Labor Code*, as well as applicable California  
13 IWC orders, and have resulted in the unjust enrichment of Defendant. As such these  
14 actions are unlawful and unfair, in violation of California *Business and Professions*  
15 *Code* §17200, *et seq.*

16 26. Plaintiff Michael Wiggins worked for Wal-Mart approximately from April  
17 1, 2004, to October 7, 2005, as an hourly employee. Technically, Mr. Wiggins was  
18 suspended on October 7<sup>th</sup>, and then he was officially terminated on October 21<sup>st</sup>. Yet,  
19 either way, Wal-Mart violated California law by not paying his final wages until  
20 November 11, 2004.

21 27. During Plaintiff Michael Wiggins' employment with Wal-Mart, Wal-Mart  
22 failed to pay overtime. Wal-Mart would "shave off" time from his time cards whereby  
23 Mr. Wiggins was not paid for all of the hours he worked. Also, when Mr. Wiggins  
24 worked a graveyard shift, Wal-Mart would count the hours worked before midnight as  
25 working one day, and all the hours worked after midnight as hours worked on another  
26 day, thereby denying Mr. Wiggins overtime pay. However, Wal-Mart did not pay Mr.  
27 Wiggins his holiday pay. Wal-Mart also failed to pay Mr. Wiggins accrued vacation

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1 pay. Wiggin's final wage statement was also incorrect as it failed to accurately reflect  
2 the real wages due and owing him.

3 28. Plaintiff Barry Smith worked for Wal-Mart approximately from  
4 September 22, 2003, to December 17, 2004, as a manager. Yet, Wal-Mart failed to pay  
5 his final wages until January 2, 2005. Mr. Smith was a manager who was paid on a  
6 salary basis. As part of his employment contract with Wal-Mart, Wal-Mart promised  
7 to pay Mr. Smith holiday pay and vacation pay in addition to his salary. However,  
8 Wal-Mart did not pay Mr. Smith his holiday pay. Wal-Mart also failed to pay Mr.  
9 Smith accrued vacation pay. Smith's final wage statement was also incorrect as it failed  
10 to accurately reflect the real wages due and owing him.

11 29. Plaintiff Danton Ballard was employed by Defendant from in or about  
12 July 2004, to on or about February 23, 2006. Upon termination, Defendant failed to  
13 pay Ballard his accrued vacation pay, holiday pay or personal time in a timely manner  
14 pursuant to California *Labor Code* §203. Ballard's final wage statement was also  
15 incorrect as it failed to accurately reflect the real wages due and owing him.

16 30. Plaintiff Nathan Lyons was employed as an associate hourly employee by  
17 Defendant for approximately one year and 2 months and terminated on or about March  
18 23, 2006. Upon termination, Defendant failed to pay Lyons his accrued vacation pay,  
19 holiday pay or personal time in a timely manner pursuant to California *Labor Code*  
20 §203. Lyons' final wage statement was also incorrect as it failed to accurately reflect  
21 the real wages due and owing him.

22 31. Plaintiffs were and are victims of the policies, practices and customs of  
23 Defendant complained of in this action in ways that have deprived him of the rights  
24 guaranteed him by California *Labor Code* §§201 through 203, 226, 227.3, and 1194,  
25 and California *Business and Professions Code* §17200, *et seq.* (Unfair Practices Act),  
26 and the applicable wage order(s) issued by the Industrial Welfare Commission,  
27 including IWC Wage Order No. 7-2001.

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## CLASS ACTION ALLEGATIONS

32. Plaintiffs bring this action on behalf of themselves and all others similarly situated, as a member of a proposed Plaintiff class (the “Class”) as defined as follows:

All individuals who are or were employed by Defendant in the State of California during the proposed class period and who are members of one or more of the sub-classes defined hereafter.

33. Plaintiffs propose that the following sub-classes be certified:

**Terminated Sub-Class:** All former employees of the Defendant who did not receive all of the wages due them at the time of termination, and/or who did not receive their final wages in a timely manner as mandated by California law. All of the named Plaintiffs herein are members of this sub-class.

**Vacation Sub-Class:** All current and former employees of Defendant who have not received full and complete compensation for all accrued “vacation pay” as the same is defined under California law and IWC regulations, including, but not limited to, vacation pay, personal time, holiday pay, etc. All of the named Plaintiffs herein are members of this sub-class.

**Compensation Sub-Class:** All properly classified hourly-pay employees of Defendant, both current and former, who have not received all compensation due them for hours worked, including overtime worked. All of the named Plaintiffs herein are members of this sub-class.

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**Itemized Statement****Sub-Class:**

All employees of Defendant, both current and former, who have not received an accurate and complete itemization of wages earned, rates of pay, etc. All the named Plaintiffs are members of this sub-class.

34. This action is brought and may properly be maintained as a class action pursuant to the provisions of *Federal Rules of Civil Procedure*, Rules 23(a)(1)-(4), 23(b)(2), and 23(b)(3). This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of those provisions.

35. The class period is designated as the period from March 20, 2002, through and including the date a judgment is rendered in this matter.

36. The Class is so numerous that the individual joinder of all its members is impracticable. While the exact number and identification of Class members are unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery from Defendant, Plaintiffs are informed and believe that the Class includes more than 10,000 members, with each sub-class containing more than 5,000 members.

37. Common questions of fact and law exist as to all members of the Class which predominate over any questions affecting only individual members of the Class. These common legal and factual questions, which do not vary from Class member to Class member, and which may be determined without reference to the individual circumstances of any Class member, include, but are not limited to, the following:

1. Whether Plaintiffs and members of the proposed Class are subject to and entitled to the benefits of California wage and hour statutes.
2. Whether, at the time of termination, Plaintiffs and members of the proposed Class received all wages due them from Defendant, the amount of any unpaid compensation due, and the amount of penalties due pursuant to California law.
3. Whether, at the time of termination, Plaintiffs and members of the proposed Class received their final wages in a timely manner, and

the amount of penalties and interest due if this is not the case. California law mandates that terminated employees receive all compensation due at the time of termination. Resigning employees must receive all wages due within 72 hours of resignation, unless more than 72 hours notice is given by the employee, in which event all wages are due at termination.

4. Whether Plaintiffs and members of the proposed Class have received all vested vacation benefits as the same are defined by California statute and IWC regulation and, if not, the amount of compensation and interest due to the Class.

5. Whether Plaintiffs and members of the proposed Class worked uncompensated overtime hours and, if so, the amount due, including interest thereon.

6. Whether Defendant has violated the mandatory provisions of *Labor Code* §226 in relation to the proposed Class and, if so, the amount of penalties and interest due the Class.

7. Whether the actions of Defendant constitute unlawful and unfair business practices as prohibited by California *Business and Professions Code* §17200, *et seq.*, and, if so, the amount of restitution due to the Plaintiff Class.

8. Whether Defendant converted property (unpaid wages including overtime, holiday pay, vacation pay, and waiting time wage continuation.)

9. The total amount of unpaid compensation, penalties, etc., due to the members of the Class based upon Defendant's violations of the California *Labor Code* as set forth herein.

38. The claims of the named Plaintiffs herein are typical of the claims of the members of the proposed Class. Plaintiffs and other Class members sustained losses,

1 injuries and damages arising out of Defendant's common policies, practices,  
2 procedures, protocols, routines, and rules which were applied to other Class members  
3 as well as Plaintiffs. Plaintiffs seek recovery for the same type of losses, injuries, and  
4 damages as were suffered by other members of the proposed Class.

5 39. Plaintiffs are adequate representatives of the Class because they are  
6 members of the Class and their interests do not conflict with the interests of the  
7 members of the Class they seek to represent. Plaintiffs have retained counsel  
8 competent and experienced in the prosecution of complex class actions, and together  
9 Plaintiffs and their counsel intend to prosecute this action vigorously for the benefit of  
10 the Class. The interests of the Class members will fairly and adequately be protected  
11 by Plaintiffs and their counsel.

12 40. A class action is superior to other available methods for the fair and  
13 efficient adjudication of this litigation since individual litigation of the claims of all  
14 Class members is impracticable. It would be unduly burdensome to the courts in which  
15 thousands of cases would proceed. Individual litigation presents the potential for  
16 inconsistent or contradictory judgments, and the prospect of a race to the courthouse,  
17 and an inequitable allocation of recovery among those with equally meritorious claims.  
18 By contrast, the class action device presents far fewer management difficulties and  
19 provides the benefit of a single adjudication, economics of scale, and comprehensive  
20 supervision by a single court.

21 41. The various claims asserted in this action are additionally or alternatively  
22 certifiable under the provisions of the *Federal Rules of Civil Procedure*, Rules 23(b)(1)  
23 and/or 23(b)(3) because:

- 24 1. The prosecution of separate actions by thousands of individual  
25 Class members would create a risk of inconsistent or varying  
26 adjudications with respect to individual Class members, thus  
27 establishing incompatible standards of conduct for Defendant.

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2. The prosecution of separate actions by individual Class members would also create the risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of the other Class members who are not a party to such adjudications and would substantially impair or impede the ability of such non-party Class members to protect their interests.

3. Defendant has acted or refused to act on grounds generally applicable to the entire Class, thereby making appropriate final declaratory and injunctive relief with respect to the Class as a whole.

### **FIRST CAUSE OF ACTION**

#### **(Statutory Wage Violation of California *Labor Code***

#### **§§201 through 203 - Late Payment Penalty - On Behalf of the Terminated Sub-Class)**

42. Plaintiffs re-allege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 41, inclusive.

43. California *Labor Code* §201 provides, in relevant part, “[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.”

44. California *Labor Code* §201 provides, in relevant part, “[i]f an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.”

45. Plaintiffs and members of the Terminated Sub-Class were previously employed by Defendant and were terminated within the class period as set forth above. Defendant failed to pay all wages due to this sub-class at the time of termination and,

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1 in addition, failed to pay all wages due in a timely manner as mandated by California  
2 *Labor Code* §§201 through 203.

3 46. When Plaintiffs' employment ended, they were owed wages which they  
4 did not receive, including overtime, vacation pay and holiday pay.

5 47. Defendant's failure to pay wages as alleged herein was willful in that  
6 Defendant knew that Plaintiffs and the Sub-Class members were not receiving all of  
7 their earned pay because of at least the following: (1) Defendant received weekly  
8 documents showing that Plaintiffs, the Class and the Sub-Class members were not  
9 receiving their earned wages; (2) Defendant had documents showing what amounts  
10 Plaintiffs, the Class and the Sub-Class members accrued for overtime pay, vacation  
11 pay, personal time and holiday pay; and (3) Defendant altered Class and Sub-Class  
12 members overtime pay records thereby reducing the amount of overtime pay due them.

13 48. The actions by Defendant was intentional and done with a willful  
14 disregard of the requirements of California law.

15 49. As a result of the violations alleged in this cause of action, Plaintiffs and  
16 the Plaintiff Class are entitled 30 days of penalty wages for each pay period when  
17 wages were not paid, plus interest, costs, and attorneys' fees.

18 50. Plaintiffs and similarly situated Class members seek penalty wages for the  
19 allocable time period prior to filing this Complaint, plus costs, interest, disbursements  
20 and attorneys' fees pursuant to California law, including but not limited to California  
21 *Labor Code* §§218.5 and 218.6.

## 22 **SECOND CAUSE OF ACTION**

### 23 **(Statutory Wage Violation of California**

### 24 ***Labor Code* §227.3 - Vested Vacation Wages - On Behalf of the Class** 25 **and the Vacation Pay Sub-Class)**

26 51. Plaintiffs re-allege and incorporate herein by reference each and every  
27 allegation contained in Paragraphs 1 through 50, inclusive.

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1       52. Defendant's written policy and actual practice applicable to all their  
2 California employees is to entitle full-time and part-time California employees to  
3 vacation, holiday and personal time. Vacation hours, personal time and holiday time  
4 is considered paid vacation time under well-established California law.

5       53. When Plaintiffs' employment ended, they were owed wages which they  
6 did not receive from Defendant, including accrued vacation pay, personal time and  
7 holiday pay.

8       54. Defendant has failed to pay members of the proposed Class all accrued  
9 vacation wages in a timely fashion upon the end of the employment relationship. This  
10 failure has resulted in a forfeiture of vacation wages in violation of California *Labor*  
11 *Code* §227.3.

12       55. Defendant has a written policy that provides for illegal forfeiture of  
13 vacation, personal and holiday time which applies to all California employees.  
14 Plaintiffs are informed and believe that Defendant's failure to comply with the  
15 provision of California *Labor Code* §227.3 was willful and done with the wrongful and  
16 deliberate intention of injuring the representative Plaintiffs and members of the  
17 proposed Class, from improper motives amounting to malice, and in conscious  
18 disregard of the rights of the representative Plaintiffs and the members of the proposed  
19 Class.

20       56. As a result of Defendant's violation of and failure to comply with *Labor*  
21 *Code* §227.3, including Defendant's willful failure to provide the representative  
22 Plaintiffs and members of the proposed Class with the accrued vacation wages due (as  
23 the same are defined under California law) at the time of termination of employment,  
24 representative Plaintiffs and members of the proposed Class are entitled to the payment  
25 of an additional thirty (30) days of wages from the date payment was due, pursuant to  
26 *Labor Code* §203.

27       57. Plaintiffs and the members of the proposed Class are entitled to recover  
28 any and all unpaid vacation time, penalties, interest and attorneys' fees.

58. Defendant's wrongful and illegal conduct in failing to comply with *Labor Code* §227.3, despite the clear legal obligation to do so, unless and until enjoined and restrained by order of this Court, will cause great and irreparable injury to Plaintiffs and all members of the proposed Class. This reasonable expectation of future violations will require current and future employees to repeatedly and continuously seek legal redress in order to gain the compensation to which they are entitled under California law. Plaintiffs have no other adequate remedy at law to insure future compliance with the California labor laws and wage orders alleged to have been violated herein.

**THIRD CAUSE OF ACTION**  
**(Statutory Wage Violation of California**  
***Labor Code* §§ 500, 510 and 1194 - Failure to Pay**  
**All Overtime Wages Due)**

59. Plaintiffs re-allege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 58, inclusive.

60. California *Labor Code* §510, provides in relevant part:

Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. . .

1       61. California *Labor Code* §1194, provides in relevant part:  
2       . . .any employee receiving less than the legal minimum  
3       wage or the legal overtime compensation applicable to the  
4       employee is entitled to recover in a civil action the unpaid  
5       balance of the full amount of this minimum wage or  
6       overtime compensation, including interest thereon,  
7       reasonable attorney's fees, and costs of suit.

8       62. Defendant willfully failed to pay overtime wages to Plaintiffs and  
9       members of the proposed Class. Wal-Mart allowed, suffered and permitted Plaintiffs  
10      and members of the proposed Class to work in excess of the statutory maximum hours  
11      per day, and in excess of the maximum hours per week, for which they were not paid  
12      at premium rates of pay. As a result, Plaintiffs and members of the proposed Class are  
13      entitled to overtime wages pursuant to California law.

14      63. Within the proposed class period as defined herein, Defendant has failed  
15      to pay Plaintiffs and the members of the proposed Class for all work performed  
16      pursuant to the requirements of the California *Labor Code*. Said compensation  
17      includes payment due at correct Class members' hourly rate, or at their correct  
18      overtime rate pursuant to California *Labor Code* §§500, 510, and 1194.

19      64. The laws of the State of California require an employer, such as  
20      Wal-Mart, to pay all overtime compensation due to all non-exempt employees.  
21      Plaintiffs and members of the proposed Compensation Sub-Class are not exempt from  
22      overtime pay requirements under California law.

23      65. Members of the Compensation Sub-Class are correctly classified by  
24      Defendant as non-exempt employees entitled to overtime compensation.

25      66. Defendants have failed and refused, and continue to fail and refuse, to pay  
26      members of the Compensation Sub-Class for all hours worked.

27      67. As a result of the actions of Defendant in failing and refusing to pay all  
28      overtime compensation due, the Plaintiffs and the Compensation Sub-Class were

1 damaged by not receiving all of the compensation which they should have received,  
 2 but did not receive. Plaintiffs and members of the Compensation Sub-Class are  
 3 entitled to receive this compensation for unpaid straight time and overtime, together  
 4 with pre-judgment interest.

5 68. As a result of Defendant's failure to pay all compensation due to  
 6 terminating Compensation Sub-Class members in compliance with California law,  
 7 Compensation Sub-Class members who are former employees of Defendant are  
 8 entitled to an additional 30 days of wages from the date said wages were due, pursuant  
 9 to *Labor Code* §203.

10 69. Plaintiffs and the proposed Class are entitled to receive an award of  
 11 reasonable attorneys' fees and costs pursuant to California *Labor Code* §1194.

#### 12 **FOURTH CAUSE OF ACTION**

##### 13 **(Statutory Wage Violation of California *Labor Code* §226 - Failure to** 14 **Accurately Record and Report Wages Earned and Rates of Pay)**

15 70. Plaintiffs hereby incorporate by reference Paragraphs 1 through 69,  
 16 inclusive, above as though fully set forth.

17 71. *Labor Code* §226 requires employers to provide employees semi-monthly  
 18 or at the time of each payment of wages with accurate itemized wage statements  
 19 showing, *inter alia*, gross wages earned, total hours worked, and all applicable hourly  
 20 rates, and the corresponding number of hours worked at each hourly rate by the  
 21 employee.

22 72. *Labor Code* §226 further provides that: "An employee suffering injury  
 23 as a result of a knowing and intentional failure by an employer to comply with  
 24 subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars  
 25 (\$50) for the initial pay period in which a violation occurs and one hundred dollars  
 26 (\$100) per employee for each violation in a subsequent pay period, not exceeding an  
 27 aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs  
 28 and reasonable attorney's fees."

73. Defendant has failed to provide Plaintiffs and the proposed Class with accurate itemized wage statements as required by *Labor Code* §226. By its actions, Defendant violated provisions of §§226, 227.3, 510, and 1194, *et seq.* of the California *Labor Code* and are therefore liable to Plaintiffs and the proposed Class for damages caused.

74. Defendant's wrongful and illegal conduct in failing to accurately record wages earned and rates of pay in accordance with *Labor Code* §226, despite the clear legal obligation to do so, unless and until enjoined and restrained by order of this Court, will cause great and irreparable injury to Plaintiffs and all members of the proposed Class. This reasonable expectation of future violations will require current and future employees to repeatedly and continuously seek legal redress in order to gain the compensation to which they are entitled under California law. Plaintiffs have no other adequate remedy at law to insure future compliance with the California labor laws and wage orders alleged to have been violated herein.

75. Plaintiffs seek payment of actual damages pursuant to California *Labor Code* §226(e) for each employee who did not receive accurate itemized wage statements during their employment with Wal-Mart. Plaintiffs also seek payment of costs, interest, disbursements and attorneys' fees pursuant to California law including, but not limited to, California *Labor Code* §§218.5 and 218.6.

## FIFTH CAUSE OF ACTION

### (Conversion of Wages)

76. Plaintiffs hereby incorporate by reference each and every allegation contained in Paragraphs 1 through 75, inclusive, herein.

77. At all times material herein, Plaintiffs and others similarly situated were employed by Defendant.

78. Within three years prior to the filing of this Complaint, up through and including the present date through adjudication, Wal-Mart failed to pay wages, including overtime, "vacation pay", and "holiday pay" during Plaintiffs' and others

1 similarly situated employments and at the termination of employment within the time  
2 periods required by California law. Wal-Mart also failed to provide accurate itemized  
3 wage statements. Wal-Mart owes monies to Plaintiffs and others similarly situated for  
4 failing to pay wages, including overtime, “vacation pay”, and “holiday pay” during and  
5 at termination of employment, and for failing to provide accurate itemized wage  
6 statements.

7 79. At the time Plaintiffs and others similarly situated left Wal-Mart’s  
8 employ, wages and damages were due and owing. The unpaid wages, actual damages,  
9 and penalty wages became the property of Plaintiffs and others similarly situated, and  
10 Plaintiffs and the others similarly situated had a right to possess their property. By  
11 failing to pay earned wages, actual damages, and penalty wages to Plaintiffs and the  
12 others similarly situated, Defendant wrongfully obtained and held the monies  
13 belonging to Plaintiffs and others similarly situated.

14 80. Plaintiffs did not consent to Defendant’s conversion of their monies and  
15 Plaintiffs were harmed by Defendant’s conversion of their monies. Defendant’s  
16 conversion of their monies was a substantial factor in causing Plaintiffs’ harm.

17 81. Under the alleged circumstances, it would be inequitable for Defendant  
18 to continue to retain the property of Plaintiffs and others similarly situated entitling  
19 both to the relief set forth below.

20 82. As a result, those wages, actual damages, and penalty wages remain due  
21 and unpaid, and Plaintiffs and others similarly situated are entitled to the value of the  
22 property at the time of the conversion, interest from that time, and fair compensation  
23 for the time and money properly expended in pursuit of the property pursuant to  
24 California *Civil Code* §§3336 and 3337, and Plaintiffs and others similarly situated are  
25 entitled to punitive damages pursuant to California *Civil Code* §3294, as well as all  
26 damages allowed under California *Labor Code* §203.

27 ///

28 ///



**SIXTH CAUSE OF ACTION**  
**(Unfair Competition: California**  
***Business and Professions Code §17200, et seq.***  
**Brought By Plaintiffs On Behalf of Themselves,**  
**The Class, The Sub-Class and the California General Public**  
**Against Defendant)**

83. Plaintiffs hereby incorporate by reference each and every allegation contained in Paragraphs 1 through 82, inclusive, herein.

84. Section 17200 of the California *Business and Professions Code* prohibits any unlawful, unfair or fraudulent business act or practice.

85. Plaintiffs bring this cause of action in a representative capacity on behalf of the general public and the persons affected by the unlawful and unfair conduct described hereafter. Plaintiffs and members of the proposed Class have suffered and continue to suffer injury in fact and monetary damages as a result of Defendant's actions.

86. The actions by Defendant including, but not limited to, the failure to pay all straight time and overtime compensation due to members of the proposed Class, the failure to properly compensate members of the proposed Class for all vacation compensation (as the same is characterized by California law and the orders of the IWC), the failure to pay all monies due at the time of the termination of employment, and all other conduct described herein constitute unlawful conduct and violations of law as alleged herein. Such actions are also unfair business practices. As such, said conduct amounts to unfair business practices in violation of California *Business and Professions Code* §17200, *et seq.* Indeed, Defendant's conduct as herein alleged has damaged Plaintiffs, the Class, and the Sub-Class members by wrongfully denying them earned wages and therefore was substantially injurious to Plaintiffs, the Class, and the Sub-Class members causing them injury in fact and the loss of money.

///

1        87. Plaintiffs are informed and believe that Defendant continues its unlawful  
 2 and unfair conduct as described herein. As a result of said conduct, Defendant has  
 3 unlawfully and unfairly obtained monies due to the Plaintiffs and members of the  
 4 proposed Class.

5        88. All members of the proposed Class can be identified by reference to  
 6 records in the possession of Defendant. The members of the proposed Class are  
 7 entitled to restitution of monies due obtained by Defendant during the Class period as  
 8 a result of Defendant's unlawful and unfair conduct.

9        89. As a direct and proximate result of the Defendant's conduct, the Plaintiff  
 10 Class is entitled to have this Court grant them a preliminary and permanent injunction  
 11 as follows:

12                DEFENDANT IS ENJOINED AND RESTRAINED FROM  
 13                FAILING TO PAY ALL COMPENSATION DUE TO  
 14                MEMBERS OF THE PLAINTIFF CLASS INCLUDING,  
 15                BUT NOT LIMITED TO, STRAIGHT TIME, OVERTIME,  
 16                VACATION PAY, ETC. IN ADDITION, DEFENDANT  
 17                IS ENJOINED AND RESTRAINED FROM FAILING TO  
 18                PROPERLY ITEMIZE WAGES AS PROVIDED BY  
 19                *LABOR CODE*

20        90. Beginning at a date unknown to Plaintiffs, but at least as early as March  
 21 20, 2002, Defendant committed, and continues to commit, acts of unfair competition,  
 22 as defined by §17200, *et seq.*, of the California *Business and Professions Code*, by and  
 23 among other things, engaging in the acts and practices described above.

24        91. Defendant's course of conduct, act, and practice in violation of the  
 25 California laws mentioned in each paragraph above constitute separate and  
 26 independent violations of §17200, *et seq.*, of the California *Business and Professions*  
 27 *Code*.

28 ///

1        92. The harm to Plaintiffs, the Class and Sub-Class members in being  
 2 wrongfully denied lawfully earned wages outweighs the utility, if any, of Defendant's  
 3 policies/practices and, therefore, Defendant's actions described herein constitute an  
 4 unfair business practice or act within the meaning of California *Business and*  
 5 *Professions Code* §17200.

6        93. Defendant's conduct described herein threatens an incipient violation of  
 7 California wage and hour laws and the California common law of conversion and/or  
 8 violates the policy or spirit of such laws or otherwise significantly threatens or harms  
 9 competition.

10       94. Defendant's course of conduct described herein also violates California  
 11 *Business and Professions Code* §17200 in that it is fraudulent, improper, and unfair.

12       95. The unlawful, unfair, and fraudulent business practices and acts of  
 13 Defendants, and each of them, as described above, have injured Plaintiffs and members  
 14 of the Class and Sub-Class in that they were wrongfully denied the payment of  
 15 overtime wages, wages for work off-the-clock, and wages due for vacations, personal  
 16 time and holiday pay.

17        Private Attorneys General Act of 2004:

18       Pursuant to the Private Attorneys General Act of 2004, California *Labor Code*  
 19 §2698, *et seq.*, Plaintiffs have given notice to Wal-Mart and to the California Labor and  
 20 Workforce Development Agency of Defendant's violations of California *Labor Code*  
 21 including, but not limited to, California *Labor Code* §§201, 202, 203, 218, 226, 227.3,  
 22 500, 510 and 1194. After the notice period provided in California *Labor Code*  
 23 §2699.3, Plaintiffs intend to amend their Complaint to include civil penalties provided  
 24 in California law including, but not limited to, California *Labor Code* §§210, 226.3,  
 25 558 and 2699, *et seq.*

26                                    **PRAYER FOR RELIEF**

27       WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly  
 28 situated, pray for judgment against Defendant as follows:

- 1       1.     For an Order certifying the Class and any appropriate sub-classes thereof
- 2             under the appropriate provisions of *Federal Rules of Civil Procedure*,
- 3             Rule 23, and appointing Plaintiffs and their counsel to represent the Class;
- 4       2.     For all wages, including overtime, “holiday pay”, and “vacation pay”, and
- 5             other related sums converted by Wal-Mart;
- 6       3.     Pursuant to California *Business and Professions Code* §17203, that
- 7             Wal-Mart be preliminarily and permanently enjoined from failing to pay
- 8             Plaintiffs, those similarly situated, and all current and former employees
- 9             all wages due upon termination of employment within the time proscribed
- 10            by law;
- 11       4.     Pursuant to California *Business and Professions Code* §17203 and the
- 12             equitable powers of this Court, that Wal-Mart be ordered to restore to
- 13             Plaintiffs all funds acquired by means of any act or practice declared by
- 14             this Court to be unlawful or fraudulent or to constitute unfair competition
- 15             under *Business and Professions Code* §17200, *et seq.*;
- 16       5.     For restitution of wages and related sums, penalty wages, attorneys’ fees,
- 17             and all other remedies available pursuant to California *Business and*
- 18             *Professions Code* §17200, *et seq.*;
- 19       6.     For statutory wages and actual damages pursuant to California *Labor*
- 20             *Code* sections, including but not limited to §203 and §226;
- 21       7.     For punitive and exemplary damages pursuant to California *Civil Code*
- 22             §3294;
- 23       8.     For costs and disbursements, pre-judgment and post-judgment interest in
- 24             the amount of ten percent (10%) per annum, liquidated damages, and
- 25             attorneys’ fees pursuant to California *Labor Code* §§218.5, 218.6, and
- 26             1194; and
- 27       9.     For such further or alternative relief in favor of Plaintiffs and all others
- 28             similarly situated as the Court deems appropriate.


1 WHEREFORE, Plaintiffs individually and on behalf of all others similarly  
2 situated request the Court award such damages as set forth above; award Plaintiffs  
3 attorneys' fees, costs and expenses of suit; order Defendant to pay pre-judgment and  
4 post-judgment interest on all amounts due to Plaintiffs as a result of this action; and  
5 order such further or alternative relief in favor of Plaintiffs and all Class members as  
6 the Court deems appropriate.

7 **JURY DEMAND**

8 Plaintiffs, on behalf of themselves and all others similarly situated, hereby  
9 demand a trial by jury in this case.

10  
11 DATED: March 2, 2007

MARLIN & SALTZMAN  
SCHWARTZ, DANIELS & BRADLEY  
LAW OFFICES OF PETER M. HART  
BAILEY PINNEY, PC  
LAW OFFICES OF BONNIE R. MAC FARLANE

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15 By:   
16  
17 STANLEY D. SALTZMAN  
ARNOLD W. SCHWARTZ  
MARCUS J. BRADLEY  
18 Attorneys for Plaintiffs  
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**PROOF OF SERVICE**

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2  
3 **STATE OF CALIFORNIA** )  
4 **COUNTY OF LOS ANGELES** ) **ss.**

5 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and  
6 not a party to the within action. My business address is SCHWARTZ, DANIELS & BRADLEY,  
located at 29229 Canwood Street, Suite 208, Agoura Hills, California 91301.

7 On **March 27, 2007**, I served the foregoing document described as **FIRST AMENDED**  
8 **CONSOLIDATED COMPLAINT** on the interested parties in this action by placing the true and  
correct copies thereof in sealed envelopes addressed as follows:

**SEE ATTACHED MAILING LIST**

9  
10 **XX BY MAIL** as follows: I am "readily familiar" with the firm's practice of collection and  
11 processing correspondence for mailing. Under that practice it would be deposited with U.S. postal  
12 service on that same day with postage thereon fully prepaid at Agoura Hills, California in the ordinary  
course of business. I am aware that on motion of the party served, service is presumed invalid if postal  
cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit.

13 Executed on **March 27, 2007**, at Agoura Hills, California.

14 **BY PERSONAL SERVICE:** I delivered such envelope by hand to the offices of the addressee.

15 Executed on \_\_\_\_\_, at Agoura Hills, California.

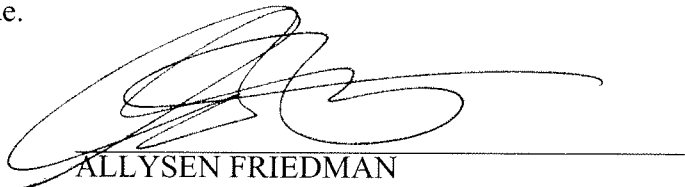
16 **BY FACSIMILE TRANSMISSION:** From FAX No. (310) 478-1232 to the person(s) and  
17 facsimile number(s) indicated on the attached mailing list. The facsimile machine I used complied with  
Rule 2003(3), and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine  
18 to print a record of the transmission.

19 **BY E-MAIL OR ELECTRONIC TRANSMISSION**

20 Based on a court order or an agreement of the parties to accept service by e-mail or electronic  
transmission, I caused the documents to be sent to the persons at the e-mail addresses noted below.  
21 I did not receive, within a reasonable time after the transmission, any electronic message or other  
indication that the transmission was unsuccessful.

22 Executed on **March 27, 2007**, at Agoura Hills, California.

23 **XX (FEDERAL)** I declare that I am employed in the office of a member of the bar of this Court  
24 at whose direction the service was made.

25  
26   
27  
28

ALLYSEN FRIEDMAN



**SERVICE LIST**

*Ballard, etc., et al. v. Wal-Mart, etc., et al.*  
USDC Case No. CV 06-3790 RSWL (JWJx)

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